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In the United States

Circuit Court of Appeals

For the Ninth Circuit

October Term, 1923

DAVID TAYLOR,
Apellant,

vs.

NEVADA HUMBOLDT TUNGSTEN MINES CO., et al
Appellees.

Brief for Appellees other than W. J. Loring

H. R. COOKE
and
(COOKE, FRENCH & STODDARD, on Brief.)
Attorneys for all appellees except W. J. Loring.

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STATEMENT OF FACTS

In plaintiff's complaint (Rec. 1113) it is alleged inter alia:

> "That thereupon the defendants Poole, Murrish, Nenzel and Friedman acting for themselves and for the defendants Lena J. Friedman, Jones, Hinch, Goodin, Twigg and Hunt-

> ington with the intent to deceive plaintiff, and for the purpose of inducing plaintiff to execute and undertake the supplemental contract (Ex. "C") hereafter referred to falsely and fraudulently **by means of telegrams and letters** informed the plaintiff that further and new development work had been carried on within said mines, mining claims and mining rights of Nevada Humboldt Tungsten Mines Co. which had developed and placed in sight, blocked out and made ready for mining, large quantities of scheelite ore of commercial value and capable of being concentrated and the concentrate so returned being of great value."

It is then alleged (Rec. 1131) that on or about April 2, 1919, Poole, Murrish and Nenzel came to Denver, Colorado for the purpose of inducing plaintiff to make a supplemental contract and that plaintiff believed and relied upon their representations; that they were acting for themselves and for their associates and that said Poole, Murrish and Nenzel (Rec. 1132)—

> "For the purpose of inducing the plaintiff to enter in and upon said supplemental contract (Ex. "C") of date April 2, 1919, then and there falsely and fraudulently and with the intent to deceive the plaintiff **represented to the plaintiff** that since the examination of the mines, mining claims and mining rights of the Nevada Humboldt Tungsten Mines Co. and the report thereof made by Howland Bancroft, mining engineer aforesaid, to this plaintiff, great and additional ore bodies of great and equal quality had been developed; that a large amount of new development work had been done and performed upon said mines and that

there was then, on said second day of April, **blocked out, in sight and ready for mining and reduction into concentrates, over 60,000 tons of scheelite ore which would carry an average of 1.75% Tungstic acid**; that each and all of the representations aforesaid were false and untrue and were known by said defendants at the time they were made to be false and untrue and were made for the purpose of deceiving the plaintiff and for the purpose of causing him to undertake and carry out the terms of said supplemental contract of April 2 (Ex. "C" attached hereto); that in truth and in fact at said time there was opened up, blocked out and in sight in said mine, not to exceed 19,000 tons of scheelite ore of an average value not to exceed 1.75% Tungstic acid. That plaintiff then and at all times thereafter relying upon and believing said false and fraudulent representations of said defendants so made as aforesaid, executed Exhibit "C" etc."

The defendants (Rec. 1229-1236) in their answer squarely and unqualifiedly deny all of the foregoing. The issue of fraud so tendered by plaintiff **is the crux of his case.** It is so admitted by plaintiff (Op. Br., p. 20) and was so considered by Trial Court (Rec. 1423). The duty on plaintiff of establishing fraud was imperative because upon no other possible theory could he maintain his suit, for it is conclusively shown by both pleadings and proof that plaintiff did not perform or offer to perform his contract (Ex. "C") **according to its terms** but only conditionally and with heavy abatement claimed by him on account of the alleged fraud.

PLAINTIFF'S ALLEGATION OF FALSE REPRESENTATIONS "BY MEANS OF TELEGRAMS AND LETTERS" IS ABSOLUTELY UNSUPPORTED BY A SINGLE LETTER OR TELEGRAM.

The decree of the Trial Court (Rec. 1437) adjudicates that no false or fraudulent representations whatsoever were made by any of the defendants to plaintiff. In its opinion (Rec. 1428) the Trial Court after an exhaustive and unusually analytical review of the evidence says:

> "In view of this correspondence and Bancroft's second report, it is impossible to find that the **letters and telegrams** in evidence from defendants to Taylor prior to April 2, 1919, contained fraudulent misstatements, or that by anything in such letters and telegrams, Taylor was misled."

Taylor made a prior contract on this same property with the defendants (Rec. 1127) on January 16, 1919. Shortly thereafter (Rec. 1129) he had Howland Bancroft, his expert mining engineer, examine and report on the property for him. The examination took Bancroft about a week's time. During February and March some letters and telegrams were exchanged between plaintiff and defendant Nenzel. In letter Nenzel to Taylor Feb. 14, 1919, (Rec. 781) Nenzel says, "Conditions at the mine are exceptionally bright". On February 24, Nenzel wired plaintiff (Rec. 783) giving foot-

ages and assays and Trial Court in its opinion found (Rec. 1425) that tested by plaintiff's expert Bancroft's assays, Nenzel's statements were substantially correct and in some instances Bancroft's assays ran even higher than Nenzel's estimates. But in any event Taylor could not have been misled or deceived by Nenzel's wires or letters at any time prior to February 24, 1919 because on February 24 (Rec. 779) Taylor writes Nenzel that "The best thing to do all around would be to close down" and then **he suggests that defendants sell him their stock at reduced price.** If at that time Taylor had been deceived into believing mine was developing so well, why ask defendant to reduce its selling price? On March 10th (Rec. 789) Nenzel writes Taylor that they "have encountered some very rich ore". The Trial Court in its opinion found, (Rec. 1426) that tested by the assays of Bancroft, plaintiff's expert, Nenzel's said statement "was literally true"—that (Rec. 1428) there was twice as much commercial ore blocked out in May as in the latter part of January. There was also a wire from Friedman to Taylor on March 25th, but it will be found that this wire (Rec. 796) stating that the mine development looked good and Nenzel's wire to Taylor March 12 "Mine never looked so good", were proven to be true by Bancroft's assays. The twenty-four feet all in good ore, mentioned by Nenzel, and the sixty feet, men-

tioned by Friedman, were between the third and fourth levels and Bancroft reports (Rec. 1428) an average in that space of 2.51% which admittedly was good ore.

Appellant's third attempted assignment of error (Op. Br. p. 18) attacking the foregoing is clearly without merit.

NO FALSE STATEMENTS OR REPRESENTATIONS OF ANY KIND WERE IN FACT MADE TO TAYLOR AT THE DENVER MEETING ABOUT APRIL 1, 1919, RELATIVE TO 60,000 TONS OR ANY DEFINITE TONNAGE, OR 1.75% VALUE OR ANY DEFINITE VALUE.

PLAINTIFF'S VERSION

Taylor says (Rec. 51) Murrish and Nenzel were present when Poole gave plaintiff the alleged false data as to tonnage; that they could not help hearing the figures given by Poole who gave (Rec. 47) the tonnages and assay values, widths of ore and that Poole stated (Rec. 56) there was over 60,000 tons of ore developed which would average over 1.75%.

On Cross Ex. Taylor says (Rec. 101) he had had charge of mines and had gone into (Rec. 103) and looked at a good many mines; that Bancroft told him (Rec. 106) in January 1919 the defendant's mine had great possibilities of being a very valuable mine; that he intended at very start to have

Bancroft examine the mine; this was understood. Bancroft made a report about February 7, 1919. Taylor read (Rec. 107) this report and knew what Bancroft said as to ore in sight and that Bancroft had reported (Rec. 111) 8100 tons ore in sight. Taylor admits (Rec. 113) defendants never suggested he should not visit or examine the mine, but on the contrary the fact is (Rec. 113-796) they suggested on March 25 that he do so. At the April first meeting Murrish (Rec. 155-156-165) demurred to going into new contract. Taylor says (Rec. 154) after talk with Poole it never entered his mind that there was less than 60,000 tons there, and that he (Rec. 155) couldn't tell (Rec. 155) whether he (Taylor) ever used 60,000 ton figures as basis for any of his calculations; that he never (Rec. 155) represented after the talk with Poole there was 25,000 or 35,000 tons surely there—"am (Rec. 158) very sure I never so used those figures". Defendants' Ex. "B" is then shown (Rec. 159) Taylor and he admits the calculations of ore tonnages of 35,400 tons and 25,500 tons made thereon on April 1, 1919 are in his own handwriting. He still insists, however, that he implicitly believed Poole's statement as to there being 60,000 tons. Later he admits (Rec. 162) discussing those figures, 25,000 and 35,000 tons, with Murrish, Nenzel and Poole at Denver. On April 17 (Rec. 361 also 839-834) Taylor writes Crucible Steel Company stating there is

an assured minimum of **43,000** tons—no mention of 60,000 tons which he claims Poole represented and which representation he says he believed. He admits (Rec. 383) preparation about May 2 or 3, 1919 of a prospectus he intended to use in interesting capital to float project in which prospectus (Rec. 384) it is stated that on April 1 (the very date he claims Poole said there was 60,000 tons) the work **indicated** an ore reserve of **41,000** tons.

With such gross contradictions occurring in his own story on the very crux of the case, we say Taylor is left without any credibility before the Court.

DEFENDANT'S VERSION

Poole says (Rec. 466) that Nenzel and Murrish were present all the time throughout the interview on March 31 at Denver. That he (Poole) gave Taylor no figures whatsoever as to tonnages, widths of ore, or assay values and never (Rec. 470-471) told Taylor that there was 60,000 tons or any definite number of tons of ore blocked out, or that the value of the ore was 1.75% or any definite value. (See also Rec. 475-478). That at that time (Rec. 480) Taylor discussed subject of amount of ore being 35,000 tons and also calculated on basis of there being 25,000 tons in the mine. That at no time did he (Poole) (Rec. 496) represent 60,000 tons blocked out or any definite quantity of ore

whatever. That (Rec. 498) he gave Taylor some figures showing percentages, which figures Taylor put upon a photostat but that he told Taylor those figures were merely estimates which had been placed on a map in possession of Poole by John Huntington who had in turn gotten his information from Morrin, defendant's mine superintendent. (See Poole's testimony further Rec. 510-512-545-552-571-572-575-576-580-581).

Nenzel says (Rec. 601) he made no representation to Taylor at the Denver meeting of any 60,000 or other tonnage or 1.75% value or other value of the ores. That (Rec. 601-603-604) Poole never made any such representations to Taylor in presence of witness (See further Rec. 608-610-613-614-615-616-617-627).

Murrish says (Rec.630) he made no representations whatever to Taylor at the Denver meeting about there being 60,000 tons, or any tonnage in the mine carrying an average of 1.75% value or any value; also that Poole did not (Rec. 631-633) make any representations or statements to that effect to Taylor at that time or at any time in the presence of the witness (See further Rec. 468-469).

Goodin says (Rec. 661-662) that he did not on or about June 1919 as testified to by Taylor, or on any occasion, state to Taylor that there were 60,000 tons of ore in the mine or any number of tons of ore whatever. That neither Nenzel, Poole or Mur-

rish (Rec. 663) made any statement to Taylor in presence of witness in regard to the tonnage of ore in the mine or the value thereof.

Hence we say that plaintiff's allegation and testimony as to Poole, Nenzel or Murrish having **represented to him** at the Denver meeting that there were 60,000 tons of ore averaging over 1.75% have been shown to be untrue because—

(1) Every allegation and statement by plaintiff relative thereto is flatly anl unqualifiedly denied both generally and specifically in the pleadings, as well as in the evidence by Nenzel, Murrish and Poole.

(2) Plaintiff's claim of misrepresentation is refuted by every physical fact in the case;

(a) The utter improbability of Poole, Nenzel and Murrish being foolish or credulous enough to attempt such a crude and clumsy imposition;

(b) Plaintiff having ample time before putting up a dollar to detect and expose the shabby falsehood and hence no possible inducement for said defendants to attempt misrepresentation;

(c) Defendants were not to get a dollar and plaintiff not obligated to put up a dollar except on mere chance that plaintiff would elect to exercise his option before June 16, 1919;

(d) Defendants invited (Rec. 113-796) plaintiff to come to Lovelock and examine mine, but at in-

stance of Plaintiff, instead, Poole, Murrish and Nenzel went to Denver;

(e) Evidence as a whole shows plaintiff and not defendants as the one who wanted and insisted upon modification of Exhibit "B", January option for 50c per share, and wanted and insisted on Exhibit "C", and that Murrish particularly signed only after plaintiff had become almost violent in his demands that the contract, Exhibit "C" be signed by defendants;

(f) The terms of Exhibit "B" were more favorable to defendants than those of Exhibit "C" were, and more onerous as to plaintiff and hence it is utterly unreasonable to believe that defendants would falsify or misrepresent in order to give plaintiff a more favorable contract than he already had;

(g) If plaintiff is correct in this case as to defendants representations of "over 1.75%" value, how account for his allegation sworn to by him (Rec. 957) in his complaint, Case No. 2263, a separate action at law for damages for same alleged fraud, that Poole, Murrish and Nenzel represented (Rec. 941) the value "from 1.50% Tungstic acid to 1.75% Tungstic acid";

(h) Poole expected employment with Taylor (Rec. 595-219-246) in event deal went through, so it would be suicidal for him to commence with Taylor by fraud and falsehood when he must have

realized his fraud would soon be exposed;

(i) While plaintiff testifies he had no very extended knowledge of mines and mining, there is no evidence that defendants knew this to be so when at the Denver meeting, but all the evidence is to effect they had a right to believe plaintiff was experienced, hence the improbability of their making the alleged representations;

(j) Taylor refutes his claim of fraud as to Poole by thereafter, and after having made the alleged discovery of the fraud, trying to arrange at San Francisco meeting in June for Poole to have charge (Rec. 426) of all Taylor's mining operations;

(k) Poole, a mining engineer, Murrish a lawyer, both men of standing and education, would be extremely unlikely to hazard their future standing by becoming parties to a miserable fraud and one which, had they attempted it, they must have known would certainly miscarry;

(l) The fact is that Poole, Nenzel and Murrish were practically unknown to plaintiff—no possible reason to believe the incredible, i.e. that he would place such childlike and perfect confidence in their statements, particularly when they were opposite to him, their interest opposed and he knew they were dealing with him at arm's length;

(m) Taylor would not even commence to proceed under his January option, Exhibit "B", with-

out examination by Bancroft, his own expert. Then why should we believe he would be any more willing to do so under the April second Exhibit "C" option?

(3) Plaintiff's claim of fraud or misrepresentation is completely refuted by his own evidence, acts and conduct in that:

(a) Notwithstanding the grave charge he now attempts to make against Poole, he was entirely willing in June 1919 (Rec. 426) to have Poole as his superintendent, holding a high and responsible position of trust and for which position Poole was totally unfit if Taylor's charge of fraud be true;

(b) The evidence as a whole clearly shows Taylor fully expected on and before April 2 to have the aid of Bancroft to make a second examination of the mine, and evidence (Rec. 223-224) clearly shows that Taylor didn't intend to put up, and did not put up, any money until after he had determined with Thane about May 2 to have Bancroft make such an examination;

(c) Defendant's Exhibit "B" (Rec. 899) prospectus, drawn at Denver meeting by Taylor, refers to **25,500** tons and **35,400** tons **ore in mine.** Plaintiff's Exhibit No. 32, (Rec. 839) letter to Crucible Steel Co. on April 17th, refers to **43,000 tons of 1.4% value,** part of which is developed on three sides and part on two sides and expresses belief that 200,000 tons may be developed, and plaintiff's

Exhibit No. 33 (Rec. 843) letter to McKenna, the same as above. These all show plaintiff absolutely mistaken in his claim of 60,000 tons representation or "over 1.75%" value, particularly as he said he had implicit confidence in Poole's alleged statement and hence he could not have hesitated in reporting Poole's figures to parties he hoped to interest. He says (Rec.) he repeated Poole's figures to his father and Brown, but why orally to these two only, and why, when discussing tonnage in writing, did he never mention the Poole figures?

(d) Exhibit "U" (Rec. 923) prospectus prepared by Taylor and Thane on train about April 27, has statement "April 1st survey indicated 41,000 tons". "41,000 tons of fully developed ore on April 1, 1919." If on April 1st Poole said 60,000 tons and if as plaintiff says he believed this implicitely why did plaintiff say only 41,000 tons on April 27, when it was manifestly to his interest to make promotion look as attractive as possible?

(e) Taylor could not have relied implicitely or otherwise upon the alleged or any representations of Poole or he would not have come all the way from Denver west to the mine, gone through it etc. April 26 and had from thirty to one hundred pannings made for him and visited and examined the entire mine as he did do and then turn East again to New York;

(f) Taylor told Poole (Rec. 377) in New York about May 20, 1919, he would not advance $20,000 on concentrates as security unless he first had report by Bancroft. Hence it is highly improbable he would advance $150,000.00 or nearly eight times the $20,000. without like assurance. True plaintiff denies making this statement, but he also stated he did not recall whether he made it or not. On May 20, Taylor wires Bancroft (Rec. 910) he is unwilling to incur expense of Jackson coming out from New York until he has Bancroft's report showing at least 40,000 tons and if so much isn't there to wire, so Jackson can be headed off;

(g) Taylor's demand for modification of option, Exhibit "C" isn't based on his alleged discovery of any misrepresentations because on May 23 and before he makes any claim to having discovered any fraud, he and Thane (plaintiff's Exhibit 22) (Rec. 828) plan to see Poole and obtain a modification of the option as to amount as well as time of payment and Thane wired Poole (plaintiff's Exhibit No. 25) (Rec. 830) accordingly;

(h) If Taylor had been deceived by defendants as he claims and when on May 30 he had assay returns on Bancroft's sampling, he would undoubtedly have complained of the misrepresentations, but instead he wires Thane (Exhibit "L") (Rec. 911) that he will endeavor to extend option six months, institute friendly bankruptsy proceedings,

work property under agreement with Court and pay creditors when Bancroft is able to report at least 40,000 tons, developed on at least two sides;

(i) So neither would Taylor, had he been the victim of fraud, found it necessary to tell Loring in New York City, June 25th (Rec. 1414) that he was going to take the mine away from the defendants, or to tell Poole (which plaintiff never denied) at Lovelock on May 27th (Rec. 1413) that he wanted Goodin to go to City as a creditor so as to "put the screws" to defendants and thereby force them to accept a modification of contract;

(j) On May 30, 1919 after Taylor had Bancroft report, and after Taylor must have known all about alleged imposition, if it existed at all, he wires Thane, Exhibit "L" (Rec. 911) about "general prospects for big cheap mine excellent", and suggests that Poole, the very man Taylor now claims he was deceived by, be brought into scheme of urging on plan of Taylor getting possession of property by "friendly bankrupt proceedings and myself appointed Receiver, make Poole Superintendent". If Taylor had been the victim of false and fraudulent representations by Poole, as Taylor now claims, it is inconceivable that he either would or could have entertained a thought of bringing Poole into close and responsible relations with him, as indicated by his telegram to Thane, Exhibit "L".

The trial Judge who had the great advantage of

seeing the witnesses, observing their demeanor on the stand, said: (Rec. 1435).

> "The evidence is not sufficient to show that the alleged false representations as to tonnage in the mine were made".

In its decree (Rec. 1437) the Court found as a fact:

> "That the defendants did not, nor did any or either of them, either acting for themselves or for any other person or persons, or otherwise make to the plaintiff at any time false and fraudulent, or false or fraudulent representations whatsoever."
>
> "That it is not true that the plaintiff was induced to enter into the contract of April 2nd, 1919, a copy of which is attached to plaintiff's complaint, marked Exhibit "C", or to perform its conditions, or any or either of them, by reason of any false and fraudulent or false or fraudulent representation or representations whatsoever."

The rule is that when as in this case, the allegations of fraud are denied by the answer—

> "these denials must be overcome by the satisfactory testimony of two witnesses, or of one witness, corroborated by circumstances which are equivalent in weight to another."

Vigel v. Hopp, 104 U. S. 441; 26 L. Ed., 765.

To same effect:

Southern Dev. Co. v. Silva, 125 U. S. 45; 31 L. Ed. 678-680.

Monroe Cattle Co. v. Becker, 147 U. S. 47; 37 L. Ed., 72-76.

Satterfield v. Malone (C. C.) 35 F., 445-447.

Walcott v. Watson (C. C.) 53 F., 429-432.
Campbell v. Northwest Eckington Co., 229 U. S., 561; 57 L. Ed. 1330-1335.
Demarest v. Winchester Repeating Arms Co. (D. C.) 257 F., 162-170.

There is no corroboration of Taylor's story, unless it is in the alleged admission made at the June meeting in San Francisco when Jackson, Taylor's lawyer, had concocted a scheme (Rec. 429) to in some way trap Poole, Murrish and Nenzel into an admission of fraud. Jackson testified (Rec. 424) that he stated at the meeting that "Mr. Poole had represented to Mr. Taylor that the mine contained 60,000 tons of commercial ore; it now developed that that representation was a **mistake,**" and while making a lengthy statement at this meeting, which embraced the matter quoted, Jackson says (Rec. 428) he would from time to time ask, "is that correct," and that Poole acquiesced by nodding his head. Poole denied (Dec. 510-511-512) that he asquiesced—Nenzel denies it (Dec. 610-611-612)—Murrish denies it (Rec. 633 to 636). Jackson admitted (Rec. 747) that Murrish denied he had ever assented.

But the point is—that Jackson's evidence if accepted as absolutely true, merely shows that the 60,000 representation **was a mistake,** and that a charge of mistake, even if acquiesced in, is not an admission of **fraud** and that a charge of fraud cannot be sustained by proof of **mistake.**

Mercier v. Lewis, 39 Cal., 532-535.
Connell v. El Paso etc., Mfg. Co. (Colo.) 78 P., 677-679.
Dudley v. Scranton, 57 N. Y., 428.

Hence, against contention that Taylor's story is to be believed, there is, therefore, no corroboration thereof.

BUT EVEN IF REPRESENTATIONS WERE MADE AS CLAIMED IN COMPLAINT AND DETAILED IN TAYLOR'S EVIDENCE THEY WERE NOT REPRESENTATIONS OF FACT BUT MERE EXPRESSIONS OF OPINION AND TAYLOR AS AN ORDINARILY PRUDENT BUSINESS MAN MUST HAVE SO ACCEPTED AND UNDERSTOOD THEM.

Taylor admits (Rec. 146) he didn't expect Poole could look into ground any better than he could. He admits that he understood he was merely getting Poole's **opinion** as to how many tons (Rec. 148) would probably be there. "That was all I expected to get from him on that point." He says that Poole stated the ore was "blocked out" or "in sight"; he knew it had not been mined, broken down etc. He knew moreover it had not been blocked out, i. e. opened on four sides because on April 17 he writes (Exhibit No. 32, Rec. 839) to Crucible Steel Co. there were 43,000 tons 1.4% part of which is "developed on three sides and part on two sides." He knew therefore that whether 60,000 tons were talked or not, the tonnage was and could in nature of thing be merely opinion matter only.

Further Taylor's prospectus Exhibit "U" (Rec. 924) prepared by him on train April 27 stating that April 1st survey "indicated 41,000 tons" all show he knew 60,000 ton talk by Poole, conceding for the moment it was ever made at all, was mere guess, mere opinion, as to what amount of ore might have been within any given area, for how otherwise account for his said statement that on April 1st (the very date when he claims Poole made the 60,000 ton representation) there were **41,000 tons**, and that only "**indicated.**"

Poole says (Rec. 498) that he told Taylor that the figures of percentage of ore values furnished by him to Taylor and which Taylor put upon the photostat, "were merely estimates" which had been placed on that map by John Huntington who was the mining engineer who had brought this map up to date, and that Mr. Huntington had gotten that information from Mr. Morrin, who was superintendent, and Mr. Morrin had arrived at those values by panning in the mine; that (Rec. 546) he told Taylor that he hadn't had occasion to visit the mine; that he had sent Mr. Huntington out there and Huntington had brought the map up to date and he and Morrin had put certain estimates and values on there; that (Rec. 547) he told Taylor he should not rely on these because while Huntington was an accurate surveyor, as to those percentages, he (Taylor) must realize they were merely estimates; that (Rec. 549) on

Tuesday, the last day of the Denver conference, the only discussion as to tonnage was a discussion with reference to **hypothetical** tonnages that were in that prospectus Exhibit "B."

Taylor's conduct in figuring Exhibit "B" prospectus at Denver at 25,500 tons and also 35,400 tons probable or possible ores and this too on the very same day he claims Poole stated to him there were 60,000 tons, ought to be conclusive evidence that, conceding for the moment Poole ever made such statement, Taylor accepted it as a mere estimate or opinion, for otherwise Taylor would have used the 60,000 ton figure in his prospectus instead of the 25,500 or 35,400 ton figure he did use. So in writing Crucible Steel Co. on April 17, there were 43,000 tons developed, part on three sides and part on two sides, and in preparing his prospectus Exhibit "U" on train April 27 stating that April 1st survey "indicated 41,000 tons," all show that he had no definite tonnage in mind because at one time he takes 25,500 tons, at another 35,400 tons, at another 43,000 tons and at another 41,000 tons as basis of calculation of ore tonnage. Had Poole in fact made positive representation of 60,000 tons, Taylor would unquestionably have used that larger tonnage figure for his promotion purposes. He naturally wanted to make it as attractive as possible, but the evidence shows he never did use the 60,000 tonnage figure that he claims Poole gave him.

> "The quantity of ore "in sight" in a mine, as that term is understood among miners, is at best a **mere matter of opinion.** It cannot be calculated with mathematical or even approximate certainty. The opinion of expert miners, on a question of this kind, might reasonably differ quite materially." (Bold face ours.)
>
> Southern Dev. Co. v. Silva, 125 U. S., 247; 31 L. Ed. 679-681.

Just so. There is not a scintilla of evidence showing defendants' pannings and tests were not honest and taken at the points indicated. That Bancroft in some instances obtained different results proves nothing as some of his tests ran higher, while others ran lower than defendants' tests. So also Bancroft's own evidence and map will show assay values of four and five per cent at one point, and in the immediate vicinity the values will drop off to nothing. Bancroft made his report which at best was his **opinion** of ore in sight and no more should Poole's statement, even if made as claimed by Taylor, be construed by Taylor or anybody as anything more than a mere expression of his **opinion.**

The representation that a certain quantity of ore is "in sight" is a mere matter of opinion.

> Tuck v. Downing, 76 Ill., 71-94. 7 Morr. Mg. Rep. 83-104.
>
> Nounnan v. Sutter etc. Co. (Cal.) 22 P., 515-516.

The allegation that there were 60,000 tons of ore

"blocked out" can mean nothing, except that the ore body was opened on four sides, or three sides, or two sides, as the case may be, and the exact number of tons of ore in such block must necessarily be conjectural, speculative and mere opinion. So with the allegation that there were 60,000 tons of ore "in sight." To be literally "in sight" it must be broken down and sufficiently tested to determine that it is ore and not waste or part waste. So even taking plaintiff's allegations and testimony at face value there is no representation of a fact, but a mere expression of opinion. The courts have had occasion to pass upon this precise question and it has been uniformly held that representations as to ore "blocked out" or ore "in sight" are mere expressions of opinion and not a statement of fact.

Southern Dev. Co. v. Silva, 125 U. S. 247, 31 L. Ed., 678.

Strattons Independence v. Dines, 126 F., 968-970.

Tuck v. Downing, 76 Ill. 71-94.

Richardson v. Lowe (C. C. A.) 149 F., 625-634.

Representation "that there were from 25,000 to 30,000 cubic yards of ore in sight was but an expression of opinion and party to whom same was made must have known this."

Eldridge v. Young America etc. Mining Co. (Wash.) 67 P. 703-707.

The statement—

"that there was enough silver ore on the dump at the mines to pay the par value of the stock" was mere matter of opinion.

Crocker v. Manley (Ill.), 56 A. S. R., 196-197.

Finally and convincingly disposing of this feature, we submit Taylor's testimony on cross-ex.

"Q. You didn't understand that he (Poole) could see into the ground any better than you could, did you?

A. No.

x-x

Q. You supposed then, did you not, that you were merely getting his opinion, based upon such development as there existed, as to how many tons would probably be there?

A. Yes.

Q. And that was all you did expect from Mr. Poole on that point, wasn't it?

A. Yes.

(Rec. 146-147-148)

BUT EVEN IF THE ALLEGED REPRESENTATIONS .WERE MADE, .AND .IF THEY WERE NOT MERE EXPRESSIONS OF OPINION, BUT WERE STATEMENTS OF FACT UPON WHICH PLAINTIFF MIGHT RELY AS SUCH, THE EVIDENCE SHOWS PLAINTIFF DID NOT RELY ON THEM, BUT RELIED THROUGHOUT ON HIS OWN EXAMINATION AND ON BANCROFT'S EXAMINATION AND REPORT.

Taylor says (Rec. 60-61) he went to mine just to be able to say he had seen it as an operating proposition—reached mine April 24th or 25th, 1919—ar-

ranged about middle of May for Bancroft to further examine mine—was at mine (Rec. 76) May 31. He admits (Rec. 153) that on April 2 he may have considered a further examination of mine before putting up money—that afterwards he contemplated further examination of mine because various people insisted on it—that he had (Rec. 154) implicit confidence in Poole's statement. He then says that he never after his talk with Poole (Rec. 155) represented to anybody there was 25,000 or 35,000 tons surely in mine—that (Rec. 158) he is very sure he never so used those figures. Defendants' Exhibit "B" was then shown (Rec. 159) to him, and he admitted the calculations there, on basis of 35,400 tons and 25,500 tons, **were in his own handwriting.** He still insists, however, that he implicitly believed Poole's statement as to there being 60,000 tons. Later he admits (Rec. 162) of discussing these figures of 25,000 and 35,000 tons with Murrish, Nenzel and Poole; also (Rec. 163) that it was on basis of 35,400 tons at Eight Dollars or 25,500 tons at Ten Dollars he intended to present proposition to get it financed; that he had planned (Rec. 166) while Denver meeting was on to visit the mine before going to New York to float proposition. He went (Rec. 170) into mine and to (Rec. 171) the bottom and all through the workings—spent (Rec. 172) about three hours —had other business (Rec. 173) in New York be-

sides going on this April 2nd option contract. That when he got to New York (Rec. 176) Thane agreed to go in for $25,000, but he insisted that mine must be examined by Bancroft again; that Taylor agreed about May 12 (Rec. 178) on Bancroft making second examination and that he would pay for it; that examination was to be made for Taylor and a report made to him. He says he was satisfied regarding tonnage, etc. before he went East but after Bancroft came into it then he wasn't and wanted to see his report; that **no money** (Rec. 179) had **actually been paid until Taylor returned from Denver and after he had changed his mind and concluded he must have Bancroft's report.** He received (Rec. 184) Bancroft's report on May 28th. He admits (Rec. 213) wiring Bancroft (Exhibit "G") that he wanted Bancroft to report 40,000 tons 1.4%. In defendants' Exhibit "K" (letter Taylor to Bancroft) Taylor refers (Rec. 216) to "check up our ideas that there is at least 40,000 tons of ore assured." He first reached (Rec. 223-224) conclusion to have mine examined about beginning of May—it was May 9th—**prior to this we had discussed having another expert make an examination**—can not tell when (Rec. 225) he made up his mind to put $95,000 into deal—but that was (Rec. 226) same time when he had also concluded not to advance any money until reports in and everything satisfactory. On April 3, 1919 (Rec.

272) Taylor wired Bancroft and Trial Court said (Rec. 275) this telegram tended to show Taylor was relying on Bancroft as his expert. On May 14, 1919 he had (Rec. 283) not determined to advance any specific amount of money on the deal—up to May 20, 1919 (Rec. 286) he had not succeeded in getting one dollar in New York. Thane's insistance on a report (by Bancroft) was (Rec. 226-289-290) a few days before May 1st. After Taylor wired (Rec. 306) Bancroft to examine and report he says he would not go in if his report was unfavorable; that his father's $25,000 check was not sent to New York until after Bancroft's report of May 22nd of 40,000 tonnage; that he would not (Rec. 316) put his father's money in on 40,000 tonnage when his father originally understood 60,000 tonnage, except with his father's consent. He says he finally (Rec. 317) concluded to go through with deal on basis of 40,000 tonnage. Taylor insisted in June, 1919 (Rec. 318) on being named general manager of the company proposed to be formed to work the properties.

Poole says (Rec. 489) that at the Denver meeting he told Taylor the data on map used would not enable any one to calculate ore tonnage but simply tonnage and that tonnage was not necessarily ore; that Taylor said "that doesn't make any difference, what I want is to get sufficient data to present to Mr. Bancroft to show him that there has been

enough additional **development work** done there since his last visit to warrant him going again and I want to use that to urge him as I have been urging him, to go and he doesn't want to go; and I want to use this to urge Mr. Bancroft to go there again" to the mine and examine it again. He says that when Taylor was at the mine in May, 1919 (Rec. 508-509) various samples and pannings were taken and Taylor said "he wasn't interested in any panning and was going to abide by Mr. Bancroft's report." That at the Denver meeting on April 2nd (Rec. 513) speaking of Morrin and his estimates of value etc., Taylor said that he didn't place any great reliance on Mr. Morrin because Mr. Bancroft had so reported that Mr. Morrin was not reliable and he didn't like him. That (Rec. 514) Taylor then said that "he was going to absolutely rely on Mr. Bancroft; that while he didn't like him as a man he certainly admired him as a technician." That (Rec. 515) Taylor said "Mr. Bancroft was either in San Francisco or would shortly be in San Francisco and he expected he would come out right away and that Mr. Taylor expected to come with him," for the mine examination. That Taylor said he expected to have Mr. Bancroft at the mine in company with himself to make this investigation and he expected to come to the mine immediately because Mr. Bancroft could only come in the very near future; that (Rec. 526) Taylor said he wanted to get from me the data

of development work because "he wanted to give it to Mr. Bancroft to induce Mr. Bancroft to make an examination; he told us previously he was trying to get Mr. Bancroft to do it and he would not do it." Taylor visited the mine about the middle of April, 1919 (Rec. 518) and stated the reason Bancroft was not with him was that Bancroft had gone on some other examination; that Taylor went all through the mine. Taylor said (Rec. 519) he came down to see the mine. He saw all of it—all of our underground main workings—he measured up quite a few of the workings—he panned some himself and Morrin and myself panned a great deal for him.

Nenzel says (Rec. 626) in the Denver conversation he heard Taylor and Poole talking about Bancroft making an examination.

The evidence shows:

(a) That Taylor expected to have Bancroft, even before he had fully arranged for the Denver conference;

(b) The evidence of Poole and Nenzel shows Taylor wanted such data as was given in order that he might satisfy Bancroft that sufficient new development work had been done to justify Bancroft making a further examination and report on the mine;

(c) At least as early as about May 9th and before Taylor had expended as much as $250, railroad fare etc. to Lovelock and back to New York, he had

definitely determined to have Bancroft make examination and report and from thence on the matter hinged entirely on results of Bancroft's report as Taylor tells us he would not have gone on with the deal if Bancroft's report was unfavorable;

(d) Taylor had actually expended but a mere trifling sum (Rec. 341 et seq) in starting for New York preparatory to carrying out April 2nd option, when he and Thane on train decided on having Bancroft examine the mine before proceeding further. Besides Taylor himself tells us his trip East was on other business besides business of this option;

(e) Taylor did not rely on any alleged representations because he took the precaution to make a trip to the property himself in the latter part of April and spent four hours or more examining same and had from thirty to one hundred pannings made for him;

(f) Had Taylor relied on the alleged representations, then how explain his refusal to advance $20,000 on concentrates without Bancroft's report first had, and how explain his wire to Bancroft that he wanted a result of 40,000 tons in mine before being willing to incur comparatively trifling outlay for Jackson coming out from New York?

(g) Had Taylor relied on the alleged representations he would not have taken 25,500 or 35,400 tons as basis in Denver prospectus and he would not

have written Crucible Steel Co. and McKenna on April 17 there was 43,000 tons developed partially on three sides and part on two sides, and he would not in the prospectus (Exhibit "U" Rec. 923) prepared about May 1st on train have used the language "April 1st survey indicates 41,000 tons." The April 1st survey he refers to is undoubtedly the data given by Poole on that day at Denver. He would not in said prospectus have stated "41,000 tons of fully developed ore on April 1st, 1919." He would not have stated therein "that on April 1st, 1919, the net value of "ore in sight" taken at price stated, was 41,000 tons;

(h) Taylor says that he told Poole he wanted deal to be on "banking basis." If Taylor had gone to New York and stated that all he knew about the property was what the vendors, practical strangers, had told him, it could hardly be said to be on a "banking basis," hence we must conclude that before going on with the deal, Taylor intended to have the report of Bancroft who everybody in the case concedes was a man of exceptional high standing in his profession.

As early as April 27, when Taylor and Thane were on the train going to New York it was definitely decided to have Bancroft make an investigation. This examination was subsequently made. In such case a party cannot complain of any misrepresentation.

Southern Dev. Co. v. Silva, 125 U. S. 247; 31 Law. Ed. 678.

"There must be the assertion of a fact on which the person entering into the transaction relied and in the absence of which it is reasonable to infer that he would not have entered into it at all or at least not upon the same terms."

Moore v. Carrick (Colo.) 140 P., 485-488.

"It is not enough that it may have remotely or indirectly contributed to the transaction or may have supplied a motive to the other party to enter into it. The representation must be the very ground on which the transaction has taken place."

Kerr on Fraud & Mistake, 72; see also page 408. See also,

Wheeler v. Dunn (Colo.) 22 P. 827.

Grymes v. Sanders, 93 U. S. 55, 23 Law. Ed., 798.

"If the purchaser investigates for himself and nothing is done to prevent his investigation from being as full as he chooses he cannot say he relied on the vendor's representations." ions."

Farrar v. Churchill, 135 U. S., 609; 34 L. Ed. 246. See also,

Murray v. Paquin, (C. C.) 173 F., 319-328-329.

Eldridge v. Young America etc. Mining Co. (Wash.) 67 P., 703-706-707.

Munkres v. McCaskill (Kan.) 68 P., 42, 43, 44, 45.

Farnsworth v. Duffner, 142 U. S. 43; 35 L. Ed. 931-934.

"When the purchaser undertakes examination for himself, he will not be heard to say that he has been deceived to his injury by the misrepresentations of the vendor."

Schapperio v. Goldberg, 192 U. S. 232; 48 L. Ed. 419-425.

"They (the cases) all with one accord impose upon a party who is given opportunity to investigate, and undertakes to do so, the responsibility for the result, unless he protects himself by a warranty" et seq.

Smith & Benham v. Curran et al. (C. C.) 138 F., 150-158.

"If the purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him, or his agents, he cannot be heard to say that he has been deceived by the vendor's misrepresentations" et seq.

Tuck v. Downing, 76 Ill. 71.

Defendant in case infra, had made alleged false representations relative to timber land in Canada. Plaintiff sent his own son to investigate the timber. The court said that while defendant's representations opened up a horizon for speculation, they did not induce the investment by plaintiff and that in such cases, the plaintiff must be deemed to have entered upon the venture by reason of the investigation made by himself or on his behalf and will not be heard to say that he relied upon the representations of the vendor.

Moant v. Loizeau (N. J.) 92 Atl. 593-594-595.

So, when defendant had represented respecting a gold mine in New Mexico that vein was from six to fifty feet wide and two hundred feet deep, that the ore went sixty-eight ounces per ton from a car previously shipped, and plaintiff visited the mine and inspected the same before paying any money and took samples, it was held he could not assign fraudulent representations as a basis for relief.

Crocker v. Manley (Ill.) 45 N. E., 577, 580-588.

When representations had been made by agents of vendor who took an option to purchase certain coal lands in Missouri that there was at least a given and definite quantity of coal on the land and pending expiration of the option, the optionees had the ground examined by their own expert, and later the property was purchased and proved valueless, the court held in an exhaustive opinion that the means of knowledge having been open to the optionees before they were called upon to exercise their option. and nothing was done to prevent optionees obtaining full information at the time of making such examination, the court held that the optionee would not be heard to say that he had been deceived by the misrepresentations of the vendor.

Morgan etc. Coal Co. v. Haldaman (Mo.) 163 S. W., 828-842-843.

> "It is almost universally held x-x that if investigation is made by the party, he cannot claim that he relied on the representations of the seller, except in cases of active fraud or concealment, or in cases where fiduciary relations existed, or peculiar knowledge on the part of seller was shown."
>
> Moore v. Carrick (Colo.) 140 P., 485-489 and cases cited.

In case infra Copper mining claims in Arizona were involved. The defendants Harmons and one Britt owned some of the claims and had options on the others. Britt held a power of attorney from Harmons authorizing him to act. Britt went to New York City and represented to plaintiff that in one of the groups there were already "blocked out" from 70,000 to 100,000 tons of copper ore ready for treatment and reduction by smelting which would yield not less than 6% copper; that the ore body had an average width of from 12 to 25 feet and that it was developed not less than 400 feet in depth; that on another group there was a large ore body from which 30 to 35 tons of 15% copper ore could be taken daily for six months. The plaintiff thereupon sent two mining experts to examine the property. This was after plaintiff had signified its intention to take the property, but before title passed. The reports of the experts seem not to have been put into the case. The plaintiff testified he relied entirely on defendant's representations, which representations

the court found as a fact were false. But the court held that having undertaken an independent investigation, plaintiff cannot be heard to say he relied on the representations of defendant, and relief was denied.

A very important case:

Mitchell Mining Co. v. Harmons (Ariz.) 100 P. 795-796.

BUT IF REPRESENTATIONS WERE MADE AS ALLEGED, AND IF THEY WERE REPRESENTATIONS OF FACT AND NOT MERE EXPRESSIONS OF OPINION, AND IF PLAINTIFF ACTUALLY RELIED UPON THEM AND NOT ON ANY INDEPENDENT INVESTIGATION, PLAINTIFF HAS NEITHER PERFORMED NOR OFFERED PERFORMANCE WHICH COURT CAN USE AS EQUITABLE BASIS FOR DECREE OF SPECIFIC PERFORMANCE.

Taylor's contract of April 2, 1919, Exhibit "B" (Rec. 1400) provided Taylor was to raise sufficient money on or before June 16, 1919 to liquidate indebtedness of the three corporations, estimated at $220,000.00; that a deposit of the required amount in the Wells Fargo Nevada National Bank, San Francisco, should be sufficient evidence of his performance to entitle him to the 62% of the stock; "That this agreement shall expire by limitation on June 16, 1919 x-x-x and be of no further force or effect if

the first party (Taylor) shall not have negotiated the loan and secured the money, x-x-x. Time is of the essence of this agreement."

Taylor alleges (Rec. 1142-1143) that on or about June 1, 1919 he offered performance provided defendants would allow plaintiff an "abatement" on account of the alleged false representations, and that he offered to advance under the terms of his contract $85,000.00—$10,000.00 of which was to be set aside as working capital and $75,000.00 distributed ratably among creditors of the three corporations, and when 20,000 tons additional ore were blocked out, he would pay the balance due the creditors of said three corporations. The offer of performnace by Taylor is shown by contract proposed by Taylor at San Francisco with Exhibit "A-1" Addenda, requiring assent of 95% of creditors before it should take effect, and evidence shows that no creditor assented but that they all refused.

The answer of the defendants, Nevada Humobldt Tungsten Mines Co., et al (Rec. 1247-1248) unqualifiedly denied plaintiff's said allegation of performance.

PLAINTIFF'S EVIDENCE RE OFFER OF PERFORMANCE.

Taylor when testifying **admits (310) he never made an unconditional offer to perform**; that (Rec. 374-375) the proposition presented by him to de-

fendants at San Francisco about June 7, 1919, was the only offer of performance. Defendants' Exhibit "Z" (Rec. 933) is part of Taylor's "offer of performance" of his agreement of April 2, 1919 (which agreement provided he was absolutely to raise and loan the three corporations, to pay off creditors, a sum estimated at $220,000.00 on or before June 16, 1919.) Said Exhibit "Z" shows Taylor offered to raise but $75,000.00 to pay off creditors, and this only on condition that Taylor be given right to repay himself therefor from proceeds of ores worked "at such times **as Mr. Taylor may deem best,**" thus placing it within Taylor's absolute power to indefinitely defer settlement and hold off creditors. No wonder the creditors refused approval. Taylor's said "offer" was further conditioned that any further advances by him to pay creditors was determinable by new ores blocked out and that what should constitute "new ore" was exclusively for determination of his own engineer, Mr. Bancroft, **thereby putting it within Taylor's own power to say when he could be called on to advance further moneys for said creditors.** Taylor's said offer also provided that mill plant should be fully insured (Rec. 936) and in case of fire loss, insurance money should be applied to **payment of Taylor's bonds,** regardless of whether creditors were paid or not. Of course the creditors objected. Taylor's "offer" was also conditioned (Rec. 935) on its approval by at

least 95% of creditors whose claims exceeded $500.00. The record shows no creditors, large or small, would accept Taylor's "offer." Edson F. Adams, one of the creditors at the creditors' meeting in San Francisco June 7, 1919 says (Rec. 407-408) that he interrupted proceedings and opposed acceptance of Taylor's "offer" before its reading was completed.

Taylor's contract, Exhibit "B," provides that he was to receive 62% of the stock "in full payment for services rendered in securing such sum of money." Clearly this contemplates that Taylor was to borrow the money from third persons not that he himself was to make the loan or any part of it. Admittedly he did not get the money from third persons but he now attempts to show performance because he says that he would have been willing to advance the necessary funds, provided the result of an independent investigation by his engineer Bancroft had proved satisfactory to him. He undertook the business as broker, not as a lender of money. His evidence shows, accepting it at its face value, that he ceased to be a broker and became a money lender. His grievance, if any, is that he was fraudulently induced to make preparations to make a loan. Neither Taylor, nor anybody else found by him was ever ready, able, or willing unconditionally to make the loan, and Taylor's evidence at the best is that he would probably have been ready, able and willing to

perform had he not been deceived.

Taylor must have been at the point where he was actually ready, able and willing to perform **unconditionally**. This point was never reached by him.

Curtis v. Mott, 35 N. Y. S., 983.
Clarke v. East Lake Lumber Co., 73 S. E. 795.

As conclusive against Taylor that he was never ready or willing to perform except on condition of his independent examination through his engineer Bancroft being satisfactory to him we submit the following, excerpted from Taylor's cross ex:

"Q. So you were ready to advance your money and carry the deal through whether Mr. Thane came in or not, without any report from Mr. Bancroft?

A. Not after Mr. Bancroft had been engaged to make the report; naturally I wanted to see his results.

Q. From the moment you engaged Mr. Bancroft to make the report you were not ready to came in on this proposition without further investigation. Is that not true?

A. Naturally when I engage a man to make a report I want to see the result of his report.
(Rec. 178-179.)

Q. And on some day intermediate your trip on the train with Mr. Thane, to New York, and the 14th day of May, you reached the conclusion that you would employ Mr. Bancroft to have him make an examination in order to advise you whether or not there were sufficient ore reserves there to justify you in putting up a large amount of money?

A. Yes, sir.
(Rec. 228.)

See also the following:

> Q. So that all the services you claim to have performed and all the expenses that you went to in this matter subsequent to the 12th or 13th day of May **were after you had determined to have the representations which you say were made, verified by a report from Mr. Bancroft.**
>
> A. Yes, I am not sure whether it was the 12th or 13th day of May or not.
>
> Q. The first telegram to Mr. Bancroft appears to have been sent by you on May 14, 1919; on what day did you reach the conclusion to have an examination of the mine made. x-x-x ?
>
> A. On Mr. Thane's advice coming East on the train along about the beginning of May.
>
> THE COURT: Has he answered that question when he first determined to have the examination made by Mr. Bancroft, the first or middle of May?
>
> THE WITNESS: I meant to say the first of May.
>
> Q. You meant to say the first of May?
>
> A. In the beginning of May when I came East with Mr. Thane."
>
> (Rec. 223-224.)

PLAINTIFF'S CASE STANDS WHOLLY UPON HIS OWN TESTIMONY AND HE IS IMPEACHED AND DISCREDITED BEFORE THE COURT.

1st. Taylor says (Rec. 150) that on April 2, 1919 Poole falsely and fraudulently represented there was over 60,000 tons of 1.75% ore blocked out and in sight in mine and that he discovered falsity of

Poole's said statement when Bancroft reported only 20,000 tons, which was about May 28, 1919. But notwithstanding this discovery of Poole's fraud and falsity, Taylor on May 30, 1919 wants Poole's aid in getting Taylor a better bargain on property and for Poole to be **Taylor's superintendent** in charge of mine operations. (Exhibit "L" Rec. 1412).

2nd. Taylor also accuses Friedman of fraud and falsity committed on or before April 2, 1919 and claims discovery of such fraud on May 28, 1919. But at San Francisco meeting about June 7, 1919 and with full knowledge, Taylor proposes to have Friedman, as well as Poole, **made directors** of Taylor's proposed new company for working the property.

3rd. Taylor thought he could deal with Friedman, Murrish et al better in San Francisco than in Lovelock and he told Poole to conceal vital information from his said associates, but to see Goodin, the Lovelock banker, and have him come to San Francisco "and if these fellows (referring to Friedman, Murrish, Nenzel et al) get obstreperous, he can put the screws on them." (Rec. 1413-1414).

4th. About June 20, 1919, Taylor had a conversation with Loring in New York and stated that he (Taylor) was "going to take the mine away from the boys, or away from Friedman." (Rec. 1414).

5th. In his complaint and testimony (Rec. 150) Taylor says Poole falsely etc. represented 60,000 tons ore blocked out which would average **over** 1.75% Tungstic Acid. But in a separate action, at law, for damages against these defendants, Taylor says Poole's representation was 60,000 tons carrying "from 1.50% of Tungstic Acid to 1.75% of Tungstic Acid." (Rec. 1417-1418).

6th. Taylor alleges he was misled and deceived on April 2, 1919 by defendants' letters and telegrams as to big rich ore development, most of which were sent prior to February 24, 1919. But we find Taylor writing Nenzel on February 24, "The best thing to do all around would be to close down." On March 25 Taylor writes Friedman, "Regarding the exercise of the option it certainly looks pretty blue at present." (Rec. 1425-1427).

7th. Taylor testifies his father agreed to put up $25,000, and take preferred stock in a company. Then Taylor admits absolutely nothing was said to his father as to how many shares his father was to receive or as to the par value, or as to capitalization of such company. (Rec. 188 et seq.)

8th. Taylor says his father's agreement was to put up **$25,000** absolutely; that no other sum was ever mentioned (Rec. 195) by Taylor as to amount of his father's subscription. But in letter May 28 (Exhibit "P" Rec. 917) Taylor states his father's agreement is for **$20,000**. In wire to Thane on May

25, Taylor says his father has taken **$20,000** (Rec. 902). In prospectus (Exhibit "V") prepared by Taylor about May 1st he states F. M. Taylor (who was his father) was taking **$20,000** of stock (Rec. 929). On cress-ex. as to how account for the discrepancy Taylor says, "I could not tell you at this time. I don't remember." (Rec. 385).

9th. Taylor says (Rec. 197-198) he knows that his father's subscription was not $20,000 as stated by him in Thane wire of May 25 (Rec. 196) but that it was $25,000 because of later advices he had received from Nenzel that total Tungsten debts was $155,000 instead of $150,000 as previously estimated, thus making it necessary for him to get $25,000 instead of $20,000 from his father. He denies (Rec. 198) that the Nenzel advice of additional $5,000 indebtedness came **after** he had wired Thane on May 25. But the evidence (Exhibit "T" Rec. 992) shows Taylor mistaken in so stating and that the Nenzel advices could not have influenced Taylor on May 25 as he did not receive same until May 26th.

10th. Taylor testifies (Rec. 198-199) that on May 25, 1919 he sent a certain important wire (Exhibit "D") to Thane; that it was sent because of his having received a wire from Thane that Thane's $25,000 would not be available until he (Thane) returned to San Francisco. The Thane wire (Exhibit "E") to that effect was shown Taylor on cross ex.

(Rec. 199) and he stated that it was the Thane wire he referred to as influencing him in sending his said wire of May 25th. But the Thane wire (Exhibit "E") is dated **May 29th** and when Taylor was asked (Rec. 201) how he could be influenced on **May 25th** by a wire of **May 29th** he says "It could not have sir, I must have been mistaken. x-x-x."

11th. Taylor alleges and testifies he expended over $8,000.00 in reliance upon the alleged representations. On cross-ex. (Rec. 341) he is unable to specify a single dollar of expense incurred by him before he talked with Thane in latter part of April 1919 when Thane insisted on independent examination of mine by Bancroft. Taylor can not say whether one dollar or $250.00 (Rec. 344) was expended before he and Thane talked about arranging for the Bancroft examination.

12th. Taylor alleges and testifies that the $8,000.00 was expended by him in going to New York and while there in his endeavoring to perform the agreement of April 2, 1919. But on cross-ex. he shows (Rec. 347) large portion of the $8,000.00 was expended on account of two other contracts and also that (Rec. 173) he had other business taking him to New York.

13th. Taylor testifies that of the $8,000.00 alleged expenditures, $5,000 was attorney's fees to John G. Jackson and was incurred in reliance on

Poole's alleged statement re 60,000 tons ore in sight. But Jackson admits (Rec. 430) that the $5,000.00 fee agreement was concluded coincident with a definite arrangement on May 14, 1919 by Taylor to wire Bancroft to make independent examination of property.

14th. Taylor alleges and testifies that in reliance on Poole's statement re 60,000 tons ore in sight, he went into a deal whereby he actually expended $8,000 in an effort to raise about $150,000. But the evidence shows (Rec. 528) that on May 20, 1919 he thought so little of Poole's alleged statement that he would not even advance $20,000 when he was secured therefor, except upon an independent examination of mine by Bancroft which was determined on (Rec. 224) about May 9th.

15th. Taylor alleges and testifies that in reliance on Poole's alleged 60,000 tons in sight representation, he (Taylor) prepared to fulfill contract to raise $150,000.00, and then testifies that he sold bonds to raise part of the money. But these sales (Rec. 435-436) were **after** May 14, 1919 and **after** Taylor had determined upon an independent examination of the property by his engineer Bancroft.

16th. Taylor alleges and testifies he relied upon Poole's alleged statement of 60,000 tons ore in sight as a representation of a fact. But he admits on cross-ex. (Rec. 146) he did not expect Poole could see into the ground any further than he

himself could and the following ensued:

> "Q. You supposed then, did you not, that you were merely getting his **opinion**, based upon such development as then existed, as to how many tons would probably be there?
> A. Yes.
> Q. **And that was all you did expect to get from Mr. Poole on that point, wasn't it?**
> A. Yes."
> (Rec. 147-148).

17th. Taylor testifies (Rec. 155) that at no time at or after the alleged 60,000 ton representation on April 2nd by Poole, did he (Taylor) ever plan to represent to anybody that there were 25,000 to 35,000 tons surely in the mine. But he admits (Rec. 159) that Exhibit "B" (Rec. 899) is in his own handwriting and was made on April 2nd and was discussed (Rec. 162) with Poole. This Exhibit shows some elaborate calculations of prospective profits to investors on basis of **25,500** tons ore in mine, marketing $10.00 per ton and **35,400** tons, marketing $8.00 per ton.

18th. Taylor states (Rec. 154) that he had implicit confidence in Poole's statement that there was at least 60,000 tons ore and that thereafter (Rec. 155) he (Taylor) actually represented to parties he sought to interest, that there was 60,000 tons ore in mine. But Taylor never mentioned name of a single person (Rec. 157) to whom he so represented the property. Instead of representing the property at 60,000 tons ore in sight, which Taylor

would certainly have done if Poole had so stated and Taylor had "implicit confidence," the fact is that on April 17, 1919 Taylor writes (Exhibit No. 32 Rec. 839) to the Crucible Steel Co., "The result is now an assured minimum of **43,000 tons** of ore." On the same date he writes (Exhibit No. 33, Rec. 843) to Vanadium Alloy Steel Co., "The result is now an assured minimum of **43,000 tons** of ore, part of which is developed on three sides and part on two sides." In prospectus prepared by Taylor with Thane on train about April 27 he says, "On April 1st new survey of this work **indicated** ore reserve of **41,000 tons.**" On May 20th Taylor in wire to Bancroft (Exhibit "K", Rec. 910) mentions **40,000 tons** as amount to be assured. On May 14th in wire to Bancroft, Taylor mentions **40,000 tons.** In pencil prospectus (Exhibit "B", Rec. 897) made by Taylor at the very time he asserts Poole represented at least 60,000 tons, Taylor mentions **25,500** tons on basis of a ten dollar market and **35,400** on basis of an eight dollar market.

19th. Taylor states (Rec. 154) he had implicit confidence in Poole's statement that there was at least 60,000 tons ore "in sight" fully developed, "blocked out" etc. on April 2, 1919. But on cross-ex. (Rec. 380) Taylor is interrogated concerning a prospectus (Exhibit "U," Rec. 923) prepared largely, (Rec. 388) if not entirely by him about May 1st while he and Thane were on train on way to New

York; that ten or twelve copies of prospectus were made, shown to many people and this prospectus was used by Taylor (Rec. 381) as basis of raising money in New York. In this prospectus Taylor says, referring to mine development, "On **April 1st** new survey of this work **indicated** ore reserve of **41,000** tons." Taylor admits that while Thane wrote this statement into prospectus, (Rec. 392) that he (Taylor) furnished the data for said statement. The prospectus further states (Rec. 926) "41,000 tons of fully developed ore on April 1 1919"; also (Rec. 927) "that on April 1, 1919 the net value of ore **in sight** exceeds the sum of this loan and interest for two years (total about $170,-000) even under pre-war conditions." Taylor's "ore in sight" admittedly refers to the **41,000 tons** last above mentioned and it is absolutely certain the "April 1st survey" referred to ore estimates made by him at the Denver conference with Poole on April 1st and 2nd, because Taylor tells us (Rec. 392) the term "survey" used in said prospectus referred to a general resume of the proposition and not to any technical survey.

20th. On May 20, 1919 Taylor wrote a letter to Nenzel (Exhibit "C", Rec. 900). On cross-ex. regarding a statement in said letter, the followng occurred:

> "Q. Calling your attention to defendants' Exhibit "C" to the following phrase: " 'No-

body in the East wanted to tackle the proposition unless they had control, and we were unwilling to give that up.' " Do you recall making that statement?

A. I do not particularly recall it, but if it is in the letter, I made it.

Q. Was it true or false?

A. I don't know, sir."

(Rec. 181)

The trial court which had the advantage of the opportunity to witness the demeanor of Taylor while on the stand, must have become convinced that Taylor completely discredited and impeached himself by the manner in which he testified, the contradictions appearing in his testimony and the strong improbabilities of his story. This estimate of the trial court is convincingly shown throughout its written opinion. The court stresses (Rec. 1413) Taylor's proposal re "friendly bankrupt proceedings" with himself as "receiver"; Taylor's insistance (Rec. 1414) on having banker Goodin of Lovelock present at the San Francisco meeting so that "if these fellows (referring to Poole, Murrish, Nenzel and Friedman) get obstreperous he can put the screws to them"; also Taylor's statement to Loring (Rec. 1414) "I am going to take the mine away from the boys or away from Friedman x-x-x and looked me right in the eye when he said it"; also (Rec. 1432) referring to Taylor's statements of 40,000 tons being satisfactory:

"The question naturally arises, why did

> Taylor say that 40,000 tons were satisfactory, if he had been led to believe, and did believe, and would not have entered into the contract if he had not believed that there were actually 60,000 tons of commercial ore in sight in the mine? It was not until Attorney Jackson came to Lovelock, about May 29th, that any mention was made, or any use was attempted to be made, of the alleged fraudulent misrepresentations. There is no hint of it even in his telegram to Thane from Ogden, dated May 30th. (Exhibit "L," supra) Taylor's whole conduct indicates that he was satisfied in January as to the value of the property; that he determined then to secure it. From that time on his single purpose seems to have been to obtain it as cheaply as possible, and with the smallest possible outlay of money on his part.

Also that Taylor (Rec. 1433) in testifying regarding Poole's alleged false representations, admitted that he (Taylor) supposed he was merely getting Poole's opinion based on such developments as then existed; also (Rec. 1434) that Taylor wanted Poole (the very person who had, as he claims, fraudulently misled him into the agreement of August 2nd) to assist and co-operate in the "friendly Bankrupt prooceedings" with Taylor as "receiver" plan; also the trial court refers (Rec. 1434) to Taylor's statement, "Bancroft believes general prospects for a big cheap mine excellent," as an "illuminating statement"; also the highly significant fact, when we remember Taylor had repeatedly testified that he was misled and deceived,

is the statement of the trial court:

> "In my judgment Taylor was neither misled nor deceived by the defendants. He was following consistently an original plan to secure the property for the smallest possible outlay of money on his part." (Rec. 1435)

Also that Taylor repeatedly testified he was ready, able and willing to perform, and the trial court said, (Rec. 1436):

> "x-x and never prior to June 16th was he actually ready, able and willing to perform unconditionally."

THE RECORD DISCLOSES AND APPELLANT ADMITS THE EVIDENCE OF PLAINTIFF IS IN SHARP CONFLICT WITH THAT OF DEFENDANTS.

,The trial court in its opinion said: , ,

> Taylor's **whole case rests on the truth of his allegations** that false and fraudulent statements were made to him, and that he relied on them to his prejudice. The burden is on him to prove these allegations by a fair preponderence of the evidence. This in my judgment he has failed to do."
>
> (Rec. 1423).

Appellant's counsel fully recognize fact that the evidence is conflicting for they say, referring to the finding supra by the Court:

> "x-x the plaintiff now comes before this Court, **taking issue with the trial Court on these** questions of fact, and contending that

these facts were established and proven upon the trial by fair preponderence of the evidence."

(App. Op. Br. 20)

Again:

"There is, however, a **sharp conflict in the testimony as to whether any representation as to tonnage or percentages of ore were made and as to what occurred at this meeting in Denver,** It therefore becomes necessary to consider all the surrounding circumstances in **weighing the evidence** for the purpose of ascertaining the truth with reference to what actually took place." x-x-x

(App. Op. Br. 50)

While boldly announcing that appellant takes issue with the Trial Court on disputed questions of fact upon which they admit the evidence is in sharp conflict, appellant nevertheless asks this Court to pass upon the credibility of the same witnesses and weigh the same evidence and to reverse the case, and this too in the teeth of the long and firmly established rule of this Court that where the findings of the Channcellor who saw the witnesses, depends upon conflicting testimony or upon the credibility of witnesses, such findings are unassailable so far as there is any testimony consistent with such findings.

"The appellant does not assert that the findings of fact are unsupported by competent evidence, but contends they are contrary to the weight of the evidence. The Trial Court made findings after an evidently careful and pains-

taking investigation of the testimony and the exhibits, and after a personal inspection of the mining properties. We have examined the record sufficiently to see that the findings are all supported by the credibile testimony of reputable witnesses. Upon settled principles, which this Court has always recognized, findings so made upon conflicting testimony are conclusive upon this appeal."

Butte etc. Copper Co. v. Clarke-Montana Realty Co.

(C. C. A. 9th Cir.) 248 Fed. 609-616.

(affirmed 249 U. S. 12; 63 Law. Ed. 447-459)

"x-x so far as it (finding of trial court) depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable."
Davis v. Schwartz, 155 U. S., 631; 39 Law. Ed. 289-293.

"The case having been tried without the intervention of a jury, the Court's findings are conclusive of the questions of fact, unless it be that there is no evidence to support them. The rule is that the findings of fact of the Court, whether special or general, will not be disturbed if there is any evidence upon which such findings could be made."

Cook v. Robinson, (C. C. A. 9th Cir.) 194 Fed., 753-759; and cases cited by the Court.

"Another equally well-established rule of law is that while the findings of the chancellor in an equity case on conflicting evidence, have not the conclusive effect given to the verdict of a jury or of the trial judge when a jury has

been waived, they are entitled to high consideration, and unless clearly against the weight of the evidence, or induced by an erroneous view of the law, they will not be disturbed by the appellate court, **and this applies with greater force when practically all the testimony was taken in open court, affording the trial judge the opportunity to note the demeanor of the witnesses for the purpose of determining their credibility, which the appellate court hearing the case on a printed record, can not.''**

(Boldface ours.) .

Unkle v. Wills, (C. C. A. 8th Cir.) 281 Fed., 29-36.

'' x-x so far as the finding of the master or judge who saw the witnesses'' 'depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.''

Adamson v. Gilliland, 242 U. S., 350; 61 Law. Ed. 356-357.

See also to same effect:

United States v. Porter Fuel Co. (C. C. A. 8th Cir.) 247 Fed., 769-773.

Black v. Aronson, (C. C. A. 8th Cir.) 187 Fed. 241-244.

Snow v. Snow, 270 Fed., 364-366-367.

American Rotary Valve Co. v. Moorehead, (C. C. A. 7th Cir.) 226 Fed., 202-203.

Porto Rico Mining Co. v. Conklin, (C. C. A. 8th Cir.) 271 Fed., 570-577.

THE BURDEN OF PROOF IN CASE OF FRAUD INCLUDES THE REQUIREMENT THAT THE PROOF MUST BE CLEAR AND

CONVINCING.

Not only is Taylor's testimony, as to the alleged fraud, in sharp and hopeless conflict with the evidence of the defendants but, as we contend, he discredited himself by his contradictory statements, and besides his whole story was met and completely refuted by the testimony of Poole, Murrish and Nenzel and by the documentary evidence adduced.

> "To establish fraud, the proof must be clear, unequivocal and convincing. Jones v. Simpson, 116 U. S. 609, 6 Sup. Ct. 538, 29 L. Ed. 742; Thorwegan vs. King, 111 U. S. 549, 4 Sup. Ct. 529, 28 L. Ed. 514; Walker v. Collins, 59 Fed. 70, 8 C. C. A. 1; Foster v. McAlester, 114 Fed. 145, 52 C. C. A. 107; Schagun v. Scott Mfg. Co., 162 Fed. 209, 89 C. C. A. 189. Proofs which only create a suspicion are not sufficient to warrant a finding of fraud. United States v. Hancock, 133 U. S. 193, 10 Sup. Ct. 264, 33 L. Ed. 601; United States Fid. & Guar. Co. v. Des Moines Nat. Bank, supra. A mere preponderance of evidence, which at the same time is vague or ambigious, is not sufficient to warrant a finding of fraud, Lalone v. United States, 164 U. S. 255, 17 Sup. Ct. 74, 41 L. Ed. 425."
>
> In re Hawks, 204 Fed., 309-316.

The case infra was an action for damages for alleged false representations. The defendant requested the trial court to instruct the jury, "that unless the **evidence clearly shows** that defendant, with intent to defraud the plaintiff, falsely represented etc.", that then they must find for the de-

fendant. The trial court refused to give the instruction and the U. S. Supreme Court held that the instruction contained a correct statement of the law and reversed the case for the refusal to give it.

Thorwegan v. King, 111 U. S., 549, 28 L. Ed., 514-516.

TAYLOR'S DEMAND IS UNCONSCIONABLE AND EQUITY WILL NEVER ENFORCE AN UNCONSCIONABLE DEMAND.

Even if all that Taylor claims respecting the representations of 60,000 tons or over 1.75% ore were true, his own evidence shows that he did nothing and expended no money in reliance on such representations. From April 2 until he left for the East about April 27th, Taylor did nothing in the way of expending either money or time. True, on April 17th he wrote a letter regarding the property to Crucible Steel Co. and sent a duplicate to McKenna but in as much as that letter referred to there being **43,000 tons** in the mine, he evidently was not then relying at all on Poole's alleged 60,000 tons representation. He left for New York City about April 27th but he admits he had other business taking him East, so this trip and expense thereof in latter part of April is at most only partly referable to the April 2 contract,—how much or how little Taylor's evidence wholly fails to show.

Whether it was at Thane's insistence or not is immaterial. But the important fact is that it was

while he and Thane were on the train East, about April 27th that the matter of an independent examination by Bancroft came up and Taylor agreed to it and he tells us that after having determined on such independent examination he wouldn't expend time or money unless the results of such examination justified it.

The defendants received absolutely nothing of value or benefit from anything Taylor did, either before or after he had determined upon Bancroft's examination. After June 16, when Taylor's option had, by its express terms, terminated, the defendants sold the property to defendant Loring for $333,-333.33, which paid off all the corporate indebtedness and left about $133,333.33,—money's available for distribution to stockholders. If Taylor's contentions be upheld he would come into 62% of this sum or about $82,666.66, an unconscionable return to him for any services or outlays (we contend there were absolutely none) he may have rendered or incurred in reliance on Poole's alleged representations.

The rule prevaling in most jurisdictions and which prevails in the United States Courts is that equity will not lend its aid to carry out an unconscionable bargain.

> "In other words, these complainants are asking the interposition of a court of equity to establish their title to property worth over half a million dollars, obtained by purchase of execution sales for $275. The immense dispro-

portion between the value and the cost shocks the conscience of a chancellor and forbids the supporting action of a court of equity. Some rights must have suffered and some wrongs must have been done by such a transaction, and a court of equity properly says that it will not lend its aid to further such an unconscionable speculation."

Jencks et al v. Quidnick Co. 34 L. Ed. 200-203; 135 U. S. 457.

"The defendant has received no benefit whatever from the contract. It would be contrary to the principles of eternal justice, and in violation of all the rules of equity in the exercise of its extraordinary powers, to allow the syndicate to recover the bonus. The rule is universal that a specific performance will always be refused "when the contract itself is unfair, one-sided, unconscionable, or affected by any other such inequitable feature, and when the specific enforcement would be oppressive upon the defendant, or would prevent the enjoyment of his own rights, or would in any other manner work injustice."

Nevada Nickel Syndicate v. National Nickel Co., et al. (C. C. Nev.) 96 F. 133-153.

"Courts of equity have often decreed specific performance where the consideration was inadequate, and it may be said in general that mere inadequacy of consideration is not of itself ground for withholding specific performance unless it is so gross as to render the contract unconscionable. But where the consideration is so grossly inadequate as it is in the present case, and the contract is made without any knowledge at the time of its making on the part of either of the parties thereto of the na-

ture of the property to be affected thereby, or of its value, no equitable principle is violated if specific performance is denied, and the parties are left to their legal remedies, if any they have."

Marks v. Gates (C. C. A. 9th Cir.) 154 F. 481-483.

"The purchaser, Cromwell, stands in no better position. He comes into court with a very bad grace when he asks to use its extraordinary powers to put him in possession of $30,000 worth of stock for which he paid only $50. The court is not bound to shut its eyes to the evident character of the transaction. It will never lend its aid to carry out an unconscionable bargain, but will leave the party to his remedy at law. This has been so often held on bills of specific performance, and in other analogous cases, that it is unnecessary to spend argument on the subject."

The Mississippi and Missouri Railroad Co. et al v. Cromwell 23 L. Ed. 367-368; 91 U. S. 643.

PLAINTIFF'S ASSIGNMENTS OF ERROR ARE EACH AND ALL FATALLY DEFECTIVE.

Plaintiff has attempted to assign errors (Rec. 1469-1472). Assignments I, II and VIII are too general to be noticed by this Court, and will be disregarded.

Rule 11, also Rule 23, sub-division 8.

Doe v. Waterloo Min. Co. (C. C. A. 9th Cir.) 70 Fed. 455-461. (construing and applying Rule 11.)

United States v. Ferguson (C. C. A. 2nd Cir.) 78 Fed. 103-105.

Fourth National Bank v. City of Belleville (C. C. A. 7th Cir.) 83 Fed., 675.

Lloyd v. Chopenall (C. C. A. 9th Cir.) 93 Fed., 599-600-601.

Deering Harvester Co. v. Kelly (C. C. A. 6th Cir.) 103 Fed., 261-264.

"An assignment x-x which compels court and counsel to look further and to search the brief in order to discover them (questions to be considered) entirely fails to accomplish the purpose of its being, and is utterly futile."

Sovereign Camp v. Jackson, (C. C. A. 8th Cir.) 97 Fed. 382-385.

Plaintiff's remaining assignments being Nos. III, IV, V, VI and IX, are subject to the objection of being too general and also to the objection that each and all of them are **aimed at the opinion** of the trial court and **not at the decree.** Such attempted assignments are wholly unavailing to appellant.

Smart v. Wright (C. C. A. 8th Cir.) 227 Fed. 84-85.

McFarlane v. Galling (C. C. A. 7th Cir.) 76 Fed., 23-24.

Crawford v. Fayetteville etc. Co. (C. C. A. 8th Cir.) 212 Fed., 107-109.

In view of the appellant's **admission** (Op. Br. 20-50) that there is a sharp conflict between the testimony on behalf of plaintiff and that on behalf of the defendants respecting what is really the one vital and controlling question in the case, no question is made, and we say no question can be made, that the findings of the trial court (Rec. 1437-1438)

that defendants made no false or fraudulent representations, and that plaintiff was not deceived and and that he was never ready, able and willing to perform, are not each and all supported by "credible evidence." This being so there can be no "obvious mistake of fact" in the findings of the trial court. The appellant has not pointed out, or attempted to point out any error whatever in the application of the law to the facts as found by the trial court, and in this situation we say that the case is squarely within the general rule firmly established in the U. S. Circuit Court of Appeals, that said court will not disturb the findings or the judgment of the trial court.

DATED: Reno, Nevada, October 17th, 1923.

Respectfully submitted,

H. R. COOKE

and

(COOKE, FRENCH & STODDARD, on Brief.)

Attorneys for all appellees except W. J. Loring.